93-1081

Supreme
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEONARD GILLIS, VALDO SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether disclosure and employee understanding play any role in determining the "contractually-defined" benefits of welfare plans protected by the Employee Retirement Income Security Act.

2. Whether summary judgment may be granted to give effect to an unauthenticated document—not produced until nearly two years after a first request—as a "plan" which supercedes an admittedly applicable and public Merger Agreement and visible practice.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Leonard Gillis and Valdo Sargeni, for themselves and all others similarly situated. Messrs. Gillis and Sargeni are former employees of Hoechst Celanese Corporation, the Respondent in this matter.

The Respondent before this Court is Hoechst Celanese Corporation. Hoechst Celanese Corporation and Hoechst Celanese Retirement Plan were parties in the proceedings below. Hoechst Celanese Corporation is a wholly-owned subsidiary of Hoechst, A.G., a German public stock corporation with its headquarters in Frankfurt, Germany. The names of all subsidiaries with public securities registrations for Hoechst Celanese Corporation and its parent for purposes of Rule 29.1 of this Court, are not presently known to Petitioners.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Leonard Gillis and Valdo Sargeni for themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Third Circuit entered in its case No. 92-1879 on September 7, 1993 dealing with severance pay issues. A timely petition for rehearing by the panel and *in banc* was denied on October 6, 1993.

OPINIONS BELOW

The decision and order of the Court of Appeals for the Third Circuit is reported at 4 F.3d 1137, 62 U.S.L.W. 2180 (3d Cir. 1993) and is reprinted in the Appendix to this Petition, page 1a, *infra,* along with the order on the petition for rehearing, p. 47a, *infra.*

The memorandum decision of the District Court is published as *Gillis v. Hoechst Celanese Corporation,* 818 F.Supp. 805 (E.D. Pa. 1992). It is reprinted in the Appendix to this Petition, p. 32a, *infra.*

STATEMENT OF JURISDICTION

A panel of the United States Court of Appeals for the Third Circuit entered its judgment on September 7, 1993, p. 1a, *infra.* With respect to severance pay issues, the Court affirmed the judgment of the United States District Court which granted summary judgment in favor of the defendants, p. 10a, *infra.* A combined petition for rehearing by the panel and suggestion of rehearing *in banc* pursuant to Fed.R.App.Pro. 40, 35, Local Appellate Rule (LAR) 35 and Internal Operating Procedure 9.5.1. (3d Cir.) was filed on September 21, 1993. The petition for rehearing was denied on October 6, 1993, p. 47a, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), with respect to a petition for a writ of certiorari from a final judgment of the United States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1002 Definitions

For purposes of this title:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or

day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1021 Duty of Disclosure and Reporting

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1); and

29 U.S.C. § 1022 Plan Description and Summary Plan Description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1).

29 U.S.C. § 1024 Filing With Secretary and Furnishing Information to Participants

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was estab-

lished or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

* * * *

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C. § 1102 Establishment of Plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

* * * *

(b) Requisite features of plan

Every employee benefit plan shall—

* * * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * * *

STATEMENT OF THE CASE

Leonard Gillis, Valdo Sargeni and others similarly situated were employees of Hoechst Celanese Corporation at its plant located in Delaware City, Delaware. They were originally employed by American Hoechst Corporation, the U.S. subsidiary of Hoechst, A.G., a major German company. On November 2, 1986, American Hoechst Corporation agreed to merge with Celanese Corporation pursuant to the terms of a merger agreement of that date. In 1987, American Hoechst Corporation and Celanese formally merged to form Hoechst Celanese Corporation, a wholly-owned subsidiary of Hoechst, A.G.

The Merger Agreement explicitly provided for separation pay upon a "reduction in base pay," voluntary retirement, or other termination events caused "directly or indirectly" by Hoechst or the merged corporation. This separation pay plan applied "notwithstanding any other policy" of Hoechst Celanese and contained no provision for deference on interpretation.[1]

The Merger Agreement policy had a stated term from 1987 to March 11, 1989. The applicability of the severance pay policy in the Merger Agreement to individual employees was based on the date that a termination was *announced*—not the date of actual separation from payroll—according to the uncontradicted testimony of Ronald Silversten, Hoechst's chief witness and labor counsel. This was confirmed by actual payments under the Merger Agreement to employees located at a South Carolina facility whose layoff was announced before March, 1989 even though they actually left the Hoechst payroll after March, 1989.

Hoechst Celanese announced its intention to dispose of the Delaware City facility in early January, 1989.

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[1] *Sejman v. Warner Lambert Co., Inc.*, 889 F.2d 1346, 1348 (4th Cir. 1989) (prior policies are no longer applicable with change in plan sponsor).

Hoechst announced that employees would not be allowed to transfer and that employees offered a job by Mirrex would not be eligible for severance pay.

Mr. Gillis requested a copy of the separation pay policy from the Hoechst "Policies and Procedure" manual at that time. The Human Resources manager in Delaware City was unable to locate a copy of a Hoechst Celanese policy in the manuals maintained in Delaware City in 1989.[2] Similar personnel in Spartanburg, South Carolina could not locate a copy either, despite active payment of severance pay in Spartanburg at the time. Mr. Gillis did receive a copy of the Merger Agreement with its confirmation of the "tin parachute", of two weeks of severance pay, in response to a request to the Securities and Exchange Commission.

Hoechst Celanese made no formal disclosure at all concerning a severance pay policy for non-union or salaried employees despite the explicit terms of the Merger Agreement and other changes. The merged company did adopt and publish a set of corporate "VALUES" in February, 1988 through its Hoechst Celanese Update. These values promised "fair treatment for individuals in managing business change" and "[i]nformed employees . . . through open communication."[3] The employees of the

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[2] The procedure to issue a policy within Hoechst involved distribution of a policy to local Human Resources offices with a signed cover memo. This document was then placed in a "Policies and Procedure" or "P&P" manual at each location. Hoechst Celanese did in fact distribute a January 1, 1989 vacation pay policy to its various locations (and Mr. Gillis as a supervisor) under a standard cover memo on January 5, 1989 in accordance with this undisputed practice. Unlike the supposed January 1, 1989, severance pay policy, this document makes no mention of an "arbitrary and capricious" standard of review.

[3] The states have, virtually uniformly, upheld the right of employees to enforce such promises, as contracts. See *Bachelder v. Communications Satellite Corporation*, 657 F. Supp. 423, 427 n.4 (D. Me. 1987) (collecting cases).

Delaware facility knew about VALUES through the Update as well as employee meetings at the plant. Based on prior practices of American Hoechst, they actually believed that these undertakings would be fulfilled.

A set of brochures and Updates issued in 1988 promised a "balanced and equitable" integrated system of benefits which would apply uniformly to Celanese, former Celanese and the former American Hoechst Corporation employees. The 1988 booklets issued to employees focused attention on the prior Celanese benefit package—due to its larger employment base—as the adoption of Celanese benefits in a merger of pension plans shows. The employees knew that Celanese Corporation had a practice which included payment of severance pay upon the sale of a business based on widespread knowledge of a sale between Celanese and American Hoechst at Greer, South Carolina before the merger. The pattern of paying severance pay of two weeks per year of service for employees was confirmed in writing by at least one letter of the Hoechst Canada PVC film division. The grapevine at other plants indicated that such severance pay was awarded to former American Hoechst employees in Spartanburg, South Carolina who were separated from Hoechst in 1989 and to select Delaware City employees as well.

Hoechst Celanese ultimately entered a sales agreement with American Mirrex Corporation, a venture capital firm with no experience in the industry through a leveraged buyout, as a result of the merger. Hoechst retained substantial practical control of Mirrex as a customer. The employees also understood that Hoechst retained a legal interest through the debt or other instruments. Hoechst did acknowledge a separation pay for separation events within the six (6) months after the sale.

Hoechst Celanese terminated Gillis, Sargeni and other employees of the Delaware City, Delaware site from its payroll at the end of August, 1989. American Mirrex

reduced or eliminated pay and benefits. Basic "in-the-envelope" pay was slashed immediately through an overall and immediate reduction in vacation of one to two weeks across the board and elimination of all "accrued" vacation, "Flex" benefits, lost matching "401(k)" contributions and service award bonuses. Mirrex also eliminated retiree medical benefits and adopted no severance pay policy whatsoever. Mirrex dramatically reduced pension accruals and announced that it had cut off unreduced early retirement benefits upon a combination of age and service totaling 85 under the "Rule of 85"—an announcement substantiated by its actuarial valuations. This appeared to trigger at least an issue of fact concerning application of the direct or indirect "reduction in pay" eligibility standard of the Merger Agreement within the six months acknowledged by Hoechst.[4]

On June 6, 1990, Gillis and Sargeni made a formal written appeal concerning unpaid benefits and request for plan documents. A July 15, 1990 response from Ronald Silversten of the legal department of Hoechst Celanese Corporation, enclosed no documents. After the complaint was filed, Hoechst forwarded a separation pay policy document dated September 1, 1990 which supposedly applied to Plaintiffs' termination over a year earlier in August, 1989. The document now cited by Hoechst as the basis of its actions in 1989 was first produced in May 1991—nearly two years after the supposed decision. It exists only in the form of Xerox copies and is blank in the space for "issue date." No one present

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[4] C.f. *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668, 1674 (1989) (vacation as wages); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983) (severance pay to employees moved from salaried to hourly); *Shawver v. R.H. Macy & Co.*, 697 F. Supp. 1515, 1525-1526 (W.D. Mo., 1988) (lack of comparable package raises question of fact on severance pay exclusion for sale); *Taylor v. Continental Group Change in Control Plan*, 933 F.2d 1227, 1234 (3d Cir. 1991) (ambiguity in severance document creates triable question of fact).

at Hoechst headquarters in 1989 could authenticate the newly-discovered "policy."

The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of Hoechst severance pay issues. The District Court concluded that the "plan" was the undisclosed "January 1, 1989" document and that Hoechst's decision to deny the employees' request for severance pay was not arbitrary or capricious. It rejected claims that disclosure is an indispensable element of the "contractually— defined benefits" of unfunded benefit plans under ERISA.

The decision of the District Court was appealed to the United States Court of Appeals for the Third Circuit under 28 U.S.C. § 1291. The Third Circuit Court of Appeals affirmed the decision of the District Court,[5] p. 10a, *infra.*

The panel decision of the U.S. Court of Appeals for the Third Circuit holds that an exception to severance pay on a sale of a division in a hidden severance pay "policy" which was never disclosed to employees nor even available can be applied to negate a separate binding Merger Agreement (filed with the SEC) and observed Hoechst Celanese practice. The Court apparently felt bound to this conclusion by a prior decision of the Court that ". . . the fact that the separation pay policy document was not distributed to the employees 'is irrelevant in determining entitlement to benefits,' *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991), p. 6a, *infra.*

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[5] The supposed January, 1989 new separation pay policy miraculously includes the "arbitrary and capricious" language that this Court adopted in February, 1989 in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 107 (1989). The vacation pay policy which was in fact posted at the plant in 1989, conversely does not contain any provision for deference. This Court only resolved a split in the courts on ERISA coverage of unfunded vacation pay plans in April, 1989, *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668 (1989).

REASONS FOR GRANTING THE WRIT

ERISA was designed to protect "contractually defined benefits," *Massachusetts Mutual v. Russell*, 437 U.S. 134, 105 S.Ct. 3085, 3093 (1989). See also, *Firestone Tire v. Bruch*, 489 U.S. 101, 113, 109 S.Ct. 948, 956 (1989). This is the core of the holding in *Massachusetts Mutual*, 105 S.Ct. at 3093, that "extra-contractual damages" are not available under ERISA—even though they may be available for bad faith in the administration of a trust.[6]

The element of *mutual* understanding based on disclosure is indispensable to all common law concepts of contract formation and interpretation with regard to employee benefits, *Hoefel v. Atlas Tack*, 581 F.2d 1, 3 (1st Cir. 1978) (employees not informed of change and thus did not agree to it); *Chapin v. Fairchild Industries*, 107 Cal. Rept. 111, 113 n.2 (Cal. Ct. App. 1973) (amendment to plan not disclosed to employees is not part of contract). It is improbable that ERISA ". . . would afford less protection to employees . . . than they enjoyed before ERISA was enacted," *Bruch*, 489 U.S. at 114, 109 S.Ct. at 956. The disclosure obligations of ERISA reflect a Congressional purpose of "ensuring that 'the individual participant knows exactly where he stands with respect to the plan'," *Bruch*, 489 U.S. at 118, 109 S.Ct. at 958.

ERISA plans have a common law base in the law of trusts and contract, *Firestone Tire v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 955 (1989). See also, *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 2720 (1980) (state legislation affecting pension trust impairs contract between employer and employee). The Courts are to create a common law based on the common law of trusts with due regard to the special nature and purpose of employee benefit plans. H.R. Conf. Rept.

[6] See, e.g., *Gould v. Starr*, 558 S.W. 2d 755 (Mo. Supp. 1977).

93-1280, reprinted [1974] U.S. Code Congress & Adm. News at 5038, 5083. As observed in *Collins v. UMWA Funds*, 298 F.Supp. 964, 967 (D.D.C. 1969), the fundamental distinction in purpose and economics between a traditional common law trust and employee benefit plan is the non-gratuitous and compensatory nature of the employee benefit plan.

The common law of trusts would apply contract rules to unfunded promises to "trusts"—such as ERISA welfare plans, 1A Scott, *Law on Trusts*, Sections 26.5, 17.3, 30, pp. 239, 297-298, 315 (4th Ed. 1988). A contract to establish a trust creates no trust "corpus" until the conditions of the contract are satisfied, *id.*, 1A Scott, *Law of Trusts* at § 30, p. 315. C.f., *Berlin v. Michigan Bell*, 852 F.2d 1154, 1162 (6th Cir. 1988) (welfare funds have no corpus). The promis*ee* is treated as the "settlor" and simply holds the promise in trust, 1A Scott, *Law of Trusts*, §§ 17.3, 26.5, pp. 238-9, 297-8. As collected in 1A Scott, *Law of Trusts*, § 30.1, p. 320; § 26.5, pp. 297-8 (promise to fund trust creates trust only on transfer), the common law holds that the normal remedy for a breach of promise to create a trust by a transfer of funds is simply an action for contractual damages.[7]

Congress approached welfare plans with limited statutory language to refine common law concepts to the context of a mass contract created by mutual conduct and practice rather than words.[8] 29 U.S.C. § 1002(1), (2)

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[7] C.f., *Massachusetts Mutual v. Russell*, 437 U.S. 134, 105 S.Ct. 3085 (1989) (punitive damages not available in welfare fund context, consistent with the common law on contracts).

[8] ERISA codifies a strain of common law about the creation of a contract by an exchange of employer conduct accepted by the work of employees without any of the words or documents so central to a standard bilateral contract. See, e.g., *Hill v. Aetna Insurance Company*, 181 Cal. Rptr. 564, 568, 570 (Cal. Ct. App. 1982); *Morosetti v. Louisiana Land and Exploration*, 522 Pa. 492, 564 A.2d 151, 155 (Pa. 1989) (Larsen, J., dissenting) (conduct can convey a promise for the Restatement of Contracts). C.f. *Scott, Law of*

define a "plan" as a "plan, fund or program," with no mention of a writing. The Department of Labor and Courts of Appeals have interpreted this language to mean practice—not a writing—in a series of cases beginning with *Donovan v. Dillingham*, 688 F.2d 1367, 1372, (11th Cir. 1982) (en banc). The development of this law was summarized in *Deibler v. UFCW Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992):

> . . . ERISA itself does not provide a definition of the word "plan." *The term is clearly not intended as a requirement of a writing. . . .* In *Donovan* [*v. Dillingham*], the Eleventh Circuit formulated the prevailing standard for determining whether a "plan" within the meaning of ERISA has been established:
>
> > In summary, a "plan, fund or program" under ERISA is established if from surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.
> >
> > * * * *
> >
> > Whether a plan exists within the meaning of ERISA is "a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person."

This simply restates the objective theory of contracts, per Calamari & Perillo, *On Contracts*, pp. 14-15 (1st Ed. 1970), that "[a] party's intention will held to be what a reasonable man in the position of the other party would conclude his manifestations to mean". As occurred in *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 96 (3d Cir. 1992), a court must piece together the terms of a contract from evidence of conduct in the absence of a dispositive disclosed document.

Trusts, § 26.5, p. 299 (conduct and statements can be read as a declaration of trust). Its writing requirements build on the history of mass contracts for an industry under the National Labor Relations Act, *see*, n.9, *infra*.

Congress allowed—indeed, required—employers to "integrate" and memorialize the terms of benefit plans by putting them in writing, 29 U.S.C. § 1102(a). This written plan is then disclosed to employees, 29 U.S.C. §§ 1102(a)(1), 1021(a), 1022(a)(1), 1024(b). This obligation is ministerial as the ". . . written instrument, . . . —[requirement is] not part of the definition of 'plan'." *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985). A failure to integrate and disclose a document is "merely . . . a failure . . . to comply with ERISA," *id.* Were it otherwise, per *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 (5th Cir. 1990), "employers could avoid federal regulation merely by failing to memorialize their employee benefit programs in a separate document." [9]

I. THE COURTS OF APPEAL ARE IN IRRECONCILABLE CONFLICT AND DISARRAY OVER THE ROLE OF DISCLOSURE AND EMPLOYEE UNDERSTANDING IN DEFINING THE TERMS OF AN EMPLOYEE BENEFIT PLAN.

The Courts of Appeal are hopelessly confused about the effect of disclosure and employee understanding in defining rights under an employee benefit plan. They need the intervention of this Court to clear away the underbrush of past confusion by establishing a clear principle that disclosure and mutual understanding are an indispensable element of any "contractually-defined" benefit.

A. The View That a Lack of Disclosure Is Irrelevant—The Plan As A Gratuitous Trust.

The Third Circuit in this case has taken the extreme view that the fact that a benefit policy was not made available to participants is "irrelevant in determining entitle-

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[9] C.f. 29 U.S.C. § 158(d) (requirement to reduce oral labor agreement to writing); *H.J. Heinz v. NLRB*, 311 U.S. 514, 61 S.Ct. 320, 324-326 (1941) (unfair labor practice arises from failure to reduce actual agreement to writing).

ment to benefits." *Gillis v. Hoechst Celanese*, 4 F.3d 1137, 1141 (3d Cir. 1993) quoting *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991). This follows another overly broad decision holding that disclosure could be rendered illusory simply by including a reserved power to amend the plan—clear overkill to correct a simple printer's error, *Hamilton v. Air Jamaica, Inc.*, 945 F.2d 74 (3d Cir. 1991). The conclusion that a plan is in fact a writing, in the fashion of gratuitous trust, and that an employer can retroactively revoke a compensation promise which his actions conveyed throws contract principles out the window.

The Third Circuit has gone to particular extremes in this case in holding that an unauthenticated document can override a Merger Agreement of admitted applicability. The Third Circuit grants summary judgment in this case based on a supposed 1989 plan despite the absence of authenticating testimony concerning adoption of the purported "plan," and in the face of evidence that it could not be found in 1989, the absence of an "issue date" and belated production nearly two years after the fact and well after the lawsuit began. In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the Fourth Circuit rejected a similar claim on virtually identical facts in order to side-step the issue of disclosure.

B. The View That Partial Disclosure Can Estop Enforcement Of An Available Formal Document—Partial Disclosure Is Deadly But Blatant Violators Walk Away Free.

The Sixth Circuit adopted a different view of the balance between a "writing" and disclosure in *Edwards v. State Farm Mutual Auto Insurance Co.*, 851 F.2d 134, 136 (6th Cir. 1988) concluding that statements in a summary plan description that is distributed to employees "are binding and if such statements conflict with those in the plan itself, the summary shall govern." It endorsed the analysis of the Eleventh Circuit that:

> It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet.

McKnight v. Southern Life and Health Insurance Co., 758 F.2d 1566, 1570 (11th Cir. 1985).

The Sixth Circuit has not found it even necessary for an employee to rely on the actual text of the summary plan description in order to prevail, *Edwards*, 851 F.2d at 137. The First Circuit, *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 522-523 (1st Cir. 1988); *Govoni v. Bricklayers Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984), Second Circuit, *Heidgerd v. Olin Corporation*, 906 F.2d 903, 907-908 (2d Cir. 1990), Fifth Circuit, *Hansen v. Continental Insurance Co.*, 940 F.2d 971, 981-982 (5th Cir. 1991), Seventh Circuit *Fuller v. CBT Corporation*, 905 F.2d 1055, 1060 (7th Cir. 1990) and apparently, the Ninth Circuit, *Arnold v. Arrow Transportation Co. of Delaware*, 926 F.2d 782, 885 n.3 (9th Cir. 1990) and the Eleventh Circuit, *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-1579 (11th Cir. 1992), concur in this approach as long as the employee relied on the summary plan description in the sense of having read it. This approach has set some courts to counting the angels on the head of a pin in seeking to distinguish an informal, but formal, "summary plan description" from other documents, *Gridley, supra.*

The potential problem lurking in this approach is a disincentive for good faith attempts at compliance. An approach which gives effect to a summary plan description—despite the availability of a formal plan document —threatens to burden employers with unexpected benefits. It creates some doubt about the statutory purpose behind the requirement for actual production of documents in 29 U.S.C. § 1024(b)(2), (4).

The approach conversely visits no sanctions whatsoever on an employer who simply violates the statute and makes no disclosure whatsoever. This was one undesirable trait of the common law, c.f., *Morosetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (Pa. 1989) (employer who kept policy confidential made no "offer" to create a contract), which Congress clearly sought to override in enacting reporting and disclosure requirements. Speaking separately as counsel for benefit plans with nearly two billion dollars in assets, the combination of the summary plan description doctrine of *Edwards* and Third Circuit rules about the irrelevance of disclosure make it difficult to counsel a client to comply voluntarily with the statute.

A related sideshow on disclosure is raging in all of the Courts of Appeal over the availability of promissory estoppel or misrepresentation as a basis of recovery under ERISA. One school holds that no representation other than a formal plan document can create rights—citing, once again, a supposed "writing" requirement for an enforceable employee benefit claim, *Elmore v. Cone Mills Corp.*, 6 F.3d 1028 (4th Cir. 1993); *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1163 (3d Cir. 1990) (collecting cases from Second, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits). A different trail of cases looks to the "fiduciary" nature of an employee benefit plan to impose liability for misrepresentation—including omissions in the context of a fiduciary relationship, *Berlin v. Michigan Bell Telephone Company*, 858 F.2d 1154, 1163-1164 (6th Cir. 1988); *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990) (citing Restatement (Trusts) 2d, Section 173); *Nichols v. Asbestos Workers Pension Plan*, 835 F.2d 881, 894 n.100 (D.C. Cir. 1987). See also, *Payonk v. HMW Industries*, 883 F.2d 221, 231, 232 (3d Cir. 1989) (Stapleton and Mansmann, JJ. concur that affirmative misrepresentations are actionable). *Black v. TIC Investments, Inc.*, 900 F.2d 112, 114-5 (7th Cir. 1990) collects the conflicting

cases from multiple circuits allowing promissory estoppel and holds—under simple common law contract principles —that a benefit promise, oral or written, should be enforceable as such absent harm to innocent third parties.

C. The View That A Lack Of Disclosure Can Create Benefit Rights.

A third view holds that procedural violations of disclosure reporting on fiduciary duties may "work a substantive harm" which can be redressed by granting benefits, *Blau v. DelMonte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1985). The purpose of this approach is to deter employers from blatant violation of the statute, *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 329 (4th Cir. 1985). The point at which disclosure violations turn into "substantive harm" and, indeed, the very meaning of that phrase, are cloaked in case-by-case mystery.

Blau and *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1499 (11th Cir. 1987) appear to equate "substantive harm" with an absence of disclosure—potentially creating benefits never expected by employees. The Seventh Circuit in *Kreutzer v. A. O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991) appears to have equated "substantive harm" with bad faith, active concealment or inducement to reliance on a faulty plan summary. A third approach appears to equate "substantive harm" with proof of an actual right to benefits—thus rendering the analysis completely circular, *Veilleux v. Atochem North America, Inc.*, 929 F.2d 74, 76 (2d Cir. 1991).

D. The View That "Contractually-Defined" Benefits Must Rest On Disclosure And Mutual Understanding—The Objective Theory Of Contractual Trusts Adopted By Congress.

The final trail of cases looks at welfare plans "in accordance with contract principles," *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 656 (8th Cir. 1991); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26,

29 (1st Cir. 1991); *Taylor v. Continental Group Change and Control Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991); *Audio Fidelity v. Pension Benefit Guaranty Corp.*, 624 F.2d 513, 517 (4th Cir. 1980); *In Re: White Farm Equipment*, 788 F.2d 1186, 1191 (6th Cir. 1986); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Pratt v. Petroleum Prod. Mgmt. Employee Sav. Plan*, 920 F.2d 651, 661 (10th Cir. 1990). This analysis readily explains the decisions precluding use of undisclosed or secret documents to define the rights of employees, *Blau*, 748 F.2d at 1355; *Frank v. Colt Industries*, 910 F.2d 90, 98 (3d Cir. 1990) (undisclosed corporate minutes); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990) (undisclosed "plan" to contradict booklet); *Kreutzer v. A. O. Smith Corp.*, 951 F.2d 739, 750 (7th Cir. 1991) (Eschbach, J., dissenting); *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409, 419 (M.D. Tenn. 1985) (confidential manual not part of severance pay "offer"), reversed, 822 F.2d 623 (6th Cir. 1987). See also, *Hoefel, supra; Chapin, supra.* This reflects the fact, per *Taylor v. Continental Group Change in Control Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991), that employee benefit plan contract "interpretation requires determining the intent of both contracting parties."

The welfare plan "contract" is not locked in stone. An employer may amend the terms simply by communicating a change before an event fixing liability, *Audio Fidelity v. PBGC*, 624 F.2d 513 (4th Cir. 1980) (subsequent change ineffective); *Pratt*, 920 F.2d at 661-663 (same). Compare, *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935-937 (5th Cir. 1993) (employees notified of change in advance). This is not an unreasonable burden to balance employee expectations against an employer's need for flexibility in adjusting benefit structures.

II. A CLEAR STATEMENT OF EMPLOYEE RIGHTS IS NECESSARY TO PROTECT A PRIVATE SECTOR MULTI-STATE OPTION IN THE CURRENT HEALTH CARE DEBATE.

The issue of employee benefit rights in welfare plans has immediate importance for the current debate concerning health care reform—an issue affecting some 8-12% of the gross national product. A line of federal decisions suggesting that employees are subject to arbitrary whim and caprice and after-the-fact changes in benefits has no long term political viability and tilts the debate in favor of a return of regulation to the states and common law. With efforts to remove ERISA regulation and preemption of state law on welfare benefits afloat in the current debate over health care reform, the Court must speak now to preserve a private sector multi-state benefit option or, perhaps, watch passively as Congress repeals ERISA coverage of welfare plans as an experiment which failed.

The current Administration proposals on health care reform include a substantial restriction of ERISA and its preemptive provisions in order to return health care and insurance regulation to the states and a National Health Board with substantive benefit authority, H.R. 3600, §§ 8402 (preemption); 1501 (National Health Board); 1014, 1221 *et seq.* (state option for single payer system); S. 1757 (same sections). A major competing bill(s) would establish a national single payer system, H.R. 1200; S. 491. Other legislation has passed the House to limit preemption of state law in other areas, H.R. 1036.

There clearly already is an active lobby to overturn this Court's decision against punitive damages in *Massachusetts Mutual v. Russell*, 437 U.S. 134 (1989)—a lobby perhaps lacking a politically-attractive lance. The decision in *McGann v. H&H Music*, 946 F.2d 401 (5th Cir. 1991), allowing a retroactive change in welfare

benefit plans—after an illness creating a continuing claim arose—was promptly overridden by the Americans With Disabilities Act. The retiree groups angered by perceptions of similar revocation of prior promises on post-retirement welfare benefits already have successfully enacted an amendment to the Bankruptcy Code on such matters, 11 U.S.C. § 1114. A return of health and benefit insurance regulation to the states or a National Board leads easily to the simple elimination of ERISA with respect to ancillary welfare benefits—such as the severance pay claim at issue in this case—in favor of treatment of all short term benefits as wages.

The loss of opportunities for dual experimentation—by the states at the government level and on a multi-state basis by larger corporations—in the context of health care reform may seriously damage the country. The feasibility of diverse state-run programs in the major metropolitan areas of the East Coast is, at best questionable. The input of the Court now on disclosure and benefit rights is critical in order to avoid a possible Congressional decision to repeal ERISA regulation of welfare benefits as a misguided experiment.

CONCLUSION

The Court has not directly addressed the basis of employee rights in welfare plans under ERISA in the nearly twenty years since the law passed. The time has now come. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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